



November 28, 2001

Mr. Sim W. Goodall
Police Legal Advisor
City of Arlington Police Department
P.O. Box 1065
Arlington, Texas 76004-1065

OR2001-5516

Dear Mr. Goodall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155346.

The Arlington Police Department received a request for information regarding the accidental shooting of a police officer during a training session. You inform us that you will release all of the requested information except for a videotape of the shooting, which you claim is excepted from public disclosure under sections 552.101 and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted videotape.

You contend that the videotape is excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses the doctrine of common-law privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy excepts from disclosure private facts about an individual. *See id.* Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d

at 683. Here, you claim that the common-law privacy interests of the witnesses to the shooting and the officer who accidentally shot the now-deceased officer except the videotape from disclosure. We note, however, that the public has a legitimate interest in the performance of governmental employees and that the privacy of such employees is narrow in scope. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow). Moreover, because the videotape depicts the accidental shooting of a police officer by another police officer during a training exercise, the public has an even greater legitimate interest in the tape.

You also imply that the deceased peace officer and his family have a common-law privacy interest in preventing the disclosure of the tape. However, a deceased person has no right of privacy, and Texas law does not permit the family of a deceased person to maintain an action for the deceased's right of privacy because that right is personal. Open Records Decision No. 432 (1985) (citing *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979)); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984); see *Moore v. Charles B. Pierce Film Enterprises, Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.) (Texas does not recognize relational or derivative right of privacy). Thus, you may not withhold the videotape under section 552.101 and common-law privacy.

Section 552.101 also encompasses judicial decisions that render information confidential. You claim that a federal case from New Jersey, *Estate of Elvis Presley v. Russen*, prevents the videotape from being disclosed. 513 F. Supp. 1339 (D.N.J. 1981). *Elvis*, however, does not address the disclosure of public information, but rather, concerns the unauthorized, commercial exploitation of one's name or likeness and issues of trademark or service mark. See *id.* As such, the case is not applicable to the matter before us and does not serve as a basis for withholding the videotape.

We next consider your claims under section 552.119. Section 552.119(a) excepts from required public disclosure "a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure," with certain exceptions that you have not indicated are applicable here. A photograph that depicts a peace officer may be released only if the peace officer gives written consent to the disclosure. Gov't Code § 552.119(b). We note that in Open Records Decision 502 (1988), this office held that there need not be a threshold determination that release of a photograph would endanger an officer before the statutory predecessor to section 552.119(a) could be invoked. The videotape at issue here depicts the images of numerous police officers. Therefore, unless the officers have given written consent, you must edit the videotape to remove or conceal the officers' images. We further note that the protection afforded by section 552.119 ceases after the death of the

officer depicted. Open Records Decision No. 536 (1989). Thus, the images of the deceased officer may not be withheld under section 552.119. If it is impossible for you to remove or conceal the officers' images, then you must withhold the videotape in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

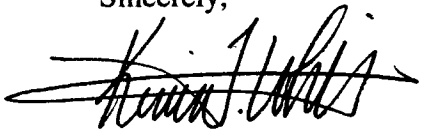
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. White", with a stylized flourish extending from the end.

Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 155346

Enc. Submitted videotape

c: Mr. Jason Trahan
The Dallas Morning News
Communications Center
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)